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Supreme Court, U.S.
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No. 85-1953

# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

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KANSAS CITY POWER & LIGHT COMPANY,
*Appellant,*

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
*Appellees.*

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ON APPEAL FROM THE SUPREME COURT OF KANSAS

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## MOTION TO AFFIRM OR DISMISS

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## QUESTIONS PRESENTED

Whether the Kansas Corporation Commission cogeneration orders and the statutory and regulatory authority upon which they are based:

(1) unconstitutionally deprive Appellant of "freedom to contract" in violation of the fifth and fourteenth amendments to the United States Constitution; and

(2) unconstitutionally effect a taking of Appellant's property without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution.

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*Appellant,*

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF KANSAS

## MOTION TO AFFIRM OR DISMISS

Appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Kansas on the ground that the jurisdictional questions presented by Appellant were definitively decided by the Court in *Federal Energy Regulatory Commission, et al. v. Mississippi, et al.*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) and *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983).

## STATEMENT OF THE CASE

### A. Introduction

This matter is an appeal by the Kansas City Power and Light Company (Appellant) from orders of the State Corporation Commission of the State of Kansas (Appellee or Commission) concerning the development of cogeneration and small power production (collectively "cogeneration") facilities. The constitutional arguments raised by Appellant in this proceeding were heard by the Supreme Court of the State of Kansas in Case No. 58,293, *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, 238 Kan. 842, 715 P.2d 19 (1986), at which time the Kansas Supreme Court found that the Commission orders attacked by Appellant did not violate the taking clause, the contract clause or the due process clause of the fifth amendment.

### B. Facts

The Commission implemented federal law and regulations and state law concerning cogeneration in Docket No. 115,379-U. Following the generic cogeneration hearings held in that docket, the Commission made findings and conclusions in an order dated April 28, 1982. (Record, Case No. 82 C 98, Vol. I, p. 61). That order, *inter alia*, established a standard formula for the computation of purchase rates to be paid cogeneration facilities having a design capacity of 100 KW or less and required electric utilities to enter into contracts with cogeneration facilities having a design capacity of more than 100 KW.

In its April 28, 1982, order, the Commission determined that, in light of the existence of considerable excess capacity within the State of Kansas, utilities operating within the State could not avoid capacity costs. Based upon sub-

stantial competent evidence of record, the Commission determined that "an energy payment alone may not provide sufficient incentive to cogeneration." (April 28, 1982, Order, Record, Case No. 82 C 98, Vol. I, p. 72). Because the congressional intent behind the Public Utilities Regulatory Policies Act (PURPA) §210 (16 U.S.C. §824a-3 *et seq.* [1980] and the Federal Energy Regulatory Commission (FERC)implementing regulations (18 C.F.R. §292.101 *et seq.* [1985]) was to encourage the development of cogeneration, the Commission relied upon coexisting state law (Parallel Generation Services Act, Kan. Stat. Ann. §66-1,184 [1979]) to establish a purchase rate in excess of avoided cost. Section by Section Analysis, 45 Fed. Reg. 12220-12221 (1980). The purchase rate established by the Commission contained an "incentive payment for capacity . . . equal to 50% of the per unit [kilowatt hour] authorized rate of return on the utility's net production plant . . ." (April 28, 1982, Order, Record, Vol I, p. 72).

Appellant and one other party applied for a rehearing of the April 28, 1982, cogeneration order on various grounds. (Record, Case No. 82 C 98, Vol. I, p. 95). The Commission granted in part and denied in part the applications for rehearing in an order dated June 18, 1982. Rehearing was held on August 18, 1982. On November 5, 1982, the Commission issued an order on rehearing which in all material respects affirmed the April 28, 1982, order. (Record, Case No. 82 C 98, Vol. I, p. 21). Appellant filed an application for rehearing of the November 5, 1982, order and the application was denied by Commission order dated December 1, 1982. The Commission issued an amended order on December 9, 1982, which modified the November 5, 1982, order in respects not material to this proceeding. Thereafter, Appellant filed an application

for rehearing of the Commission's December 9, 1982, amended order. That application was deemed denied by operation of law. Kan. Stat. Ann. §66-118b (1976).

On December 30, 1982, Appellant filed its application for judicial review in both the Kansas Court of Appeals (Case No. 82-55245-A) and the District Court of Linn County, Kansas (Case No. 82 C 98). Appellant subsequently filed a motion to stay proceedings in the Kansas Court of Appeals, a motion to stay the order of the Commission dated November 5, 1982, in the District Court of Linn County, Kansas, and a motion to stay the order of the Commission dated November 5, 1982, with the Commission. On January 26, 1983, the Kansas Court of Appeals dismissed Appellant's application for judicial review. On January 17, 1983, the Commission denied Appellant's motion to stay. On February 4, 1983, the District Court of Linn County, Kansas, denied Appellant's motion to stay.

In a journal entry dated May 12, 1983, the District Court of Linn County, Kansas, held as follows:

> Due to the compelling public interest with which public utilities are clothed, it is the judgment of the court that the forementioned statutes, acts, regulations, and orders were enacted, promulgated, and issued in the public interest, are reasonably related to federal and state energy objectives, and do not violate the due process guarantees or taking protections of the United States and Kansas Constitutions.
>
> * * *
>
> It is the judgment of the Court that the Commission did possess statutory jurisdiction and authority under K.S.A. 66-1,185 to issue the cogeneration and small power production orders here complained of because

> K.S.A. 66-1,185 authorizes the Commission to implement PURPA and regulations promulgated pursuant thereto and, further, it is the judgment of the Court that such orders are lawful, reasonable and appropriate in the circumstances and should be sustained.

Record, Case No. 82 C 98, Vol. I, p. 167.

Appellant then appealed the judgment of the Linn County District Court to the Kansas Court of Appeals. The matter was subsequently removed to the Kansas Supreme Court. In *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, 234 Kan. 1052, 676 P.2d 764 (1984), the Kansas Supreme Court reversed the district court on an issue unrelated to the constitutional arguments raised in the instant appeal. The Kansas Supreme Court found that the orders of the Commission were unlawful because the rates set by the Commission order exceeded avoided cost. The rates were in violation of PURPA and the FERC regulations because PURPA preempted the ability of states to set rates above avoided cost. (234 Kan. at 1057)[1]

The Kansas Supreme Court, in *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, 238 Kan. at 844, elected to note that in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), the United States Supreme Court held that

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1. In deciding that KCC orders setting a purchase rate in excess of avoided cost were unlawful, the Kansas Supreme Court apparently relied upon *Consolidated Ed. Co. v. P.S.C.*, 98 App. Div.2d 377, 471 N.Y.S.2d 684 (1983), which has subsequently been overturned by the New York Court of Appeals. *Consolidated Ed. Co. v. P.S.C.*, 63 N.Y.2d 424, 472 N.E.2d 981, 483 N.Y.S.2d 153 (1984). The United States Supreme Court declined to review the matter. 85 L.Ed.2d 132, 105 S.Ct. 1831 (1984).

PURPA did not violate the commerce clause or the tenth amendment of the United States Constitution.

On remand, in an order dated October 15, 1984, the Commission established a purchase rate for cogenerated energy which conformed in all respects to the opinion of the Kansas Supreme Court and implemented PURPA and the federal regulations exclusively. Appellant filed an application for rehearing relating to the Commission's October 15, 1984, order, and the application was denied by Commission order dated November 1, 1984.

Appellant appealed the Commission order to the Linn County District Court. In *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, No. 84 C 67 (D. Kan. May 31, 1985), Judge Fossey of the Linn County District Court upheld the constitutionality of the Commission order. Appellant appealed the Linn County decision to the Supreme Court of the State of Kansas, raising constitutional issues. The Kansas Supreme Court, in *Kansas City Power & Light v. State Corporation Commission*, held that:

> under the facts of this case, the provisions of the Federal Public Utility Regulatory Policies Act of 1978 (PURPA, codified as amended at 16 U.S.C. §§ 824a-3, 824i [1982]), Federal Energy Regulatory Commission (FERC) regulations implementing PURPA (18 C.F.R. §§ 292.101-.602 [1985]), K.S.A. 66-1,184 and K.S.A. 66-1,185, are not in violation of the taking clause, the contracts clause or the due process clause of the Fifth Amendment to the United States Constitution.

*Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, 238 Kan. 842, 842, 715 P.2d 19 (1986). The instant appeal is taken from this Kansas Supreme Court decision. 238 Kan. 842.

## ARGUMENTS IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

### 1. Appellant's Alleged State-Federal Regulatory "Scheme" Does Not Exist.

In framing the jurisdictional question, Appellant constructs a federal-state regulatory "scheme" consisting of:

a. Kansas statutes and administrative regulations, specifically K.S.A. 66-1,184, 66-1,185; styled the Kansas Parallel Generation Services Act and Kansas Natural Gas Policy Act, respectively; and

b. Federal statutes and regulations, specifically Sections 202 and 210 of PURPA and FERC regulations implementing the congressional action.

The constitutional infirmities alleged by Appellant are directed solely at the federal legislation and regulations. The final order of the Kansas Corporation Commission, dated October 15, 1984, and now attacked by Appellant, implemented and relied solely upon PURPA and regulations promulgated pursuant thereto. Appellant acknowledges this factual sequence in its jurisdictional statement but still proposes the existence of a federal-state regulatory "scheme."

In the final order of the Commission, the state statutes are relevant only in that Kan. Stat. Ann. §66-1,185 (1979) authorized the State Corporation Commission as the implementing state agency of the congressional mandate. Kan. Stat. Ann. §66-1,184 (1979) is independent of PURPA, and its implementation could give rise to a separate cause of action, but does not in this case because it was not relied on by the Kansas Corporation Commission in the final order from which this appeal is taken.

**2. Appellant's Jurisdictional Statement Raises a Federal Question Which Was Settled by This Court in Federal Energy Regulatory Commission, et al. v. Mississippi, et al., 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) and American Paper Institute v. American Electric Power Service Corp., 461 U.S. 402, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983).**

In *Kansas City Power and Light v. The State Corporation Commission of the State of Kansas,* 238 Kan. 842, 715 P.2d 19 (1986), the Kansas Supreme Court noted that the subject KCC order implements Sections 202 and 210 of PURPA, 16 U.S.C. §824a-3, 824i (Supp. II 1978), amended by 16 U.S.C. §§824a-3, 824i (Supp. IV 1980), FERC regulations implementing PURPA (18 C.F.R. §§292.101-602 [1985]), Kan. Stat. Ann. §66-1,184 (1979), and Kan. Stat. Ann. §66-1,185 (1979). (238 Kan. 842 at 842-43). The only issue the Kansas Supreme Court addressed in the *Kansas City Power & Light* case was whether Sections 202 and 210 of PURPA and regulations promulgated pursuant thereto by FERC violate the fifth amendment of the Constitution of the United States. (238 Kan. 842 at 845). The Kansas Supreme Court stated that:

> The test for due process is whether the legislative means selected has a real and substantial relation to the objective sought. The regulation must be reasonable in relation to its subject and adopted in the interest of the community. *Manhattan Buildings, Inc. v. Hurley,* 231 Kan. 20, 30, 643 P.2d 87 (1982).

*Kansas City Power & Light Company v. The State Corporation Commission of the State of Kansas,* 238 Kan. at 845.

> The federal government may control the conduct of individuals by any regulation which upon reasonable grounds can be regarded as adapted to promote the common welfare, convenience or prosperity. In the present case, the production of electrical power is a relevant concern for Congress. The United States Supreme Court ruled that PURPA was "reasonably adapted to the end permitted by the Constitution." *FERC v. Mississippi,* 456 U.S. 742, 758, 72 L.Ed.2d 532, 102 S.Ct. 2126 (1982). As the Supreme Court has ruled that there was "ample support for Congress' conclusions," 456 U.S. at 756, it would be difficult for us to find that there was not. PURPA was designed to encourage increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers. The law has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. Therefore, the requirements of due process are satisfied.

*Kansas City Power & Light Company v. State Corporation Commission of the State of Kansas, et al.,* 238 Kan. at 854-55.

In *FERC v. Mississippi,* FERC and the Secretary of Energy appealed a district court ruling that PURPA Titles I and III and Section 210 were unconstitutional. The Supreme Court found that PURPA did not violate the commerce clause or the tenth amendment. (456 U.S. at 753, 755-57). The tenth amendment test applied in *FERC v. Mississippi* is not relevant to the instant appeal. However, the commerce clause test applied in that case is relevant to this appeal because it is the identical test

applied by the Kansas Supreme Court to Appellant's alleged fifth and fourteenth amendment violations in the decision from which this appeal is taken.

In *FERC v. Mississippi,* this Court applied the standard established in *Hodel v. Indiana,* 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981):

> [A] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Id.,* at 323-324 [69 L Ed 2d 40, 101 S Ct 2376].

*FERC v. Mississippi,* 456 U.S. at 754. The Court further stated that:

> Our inquiry, then, is whether the Congressional findings have a rational basis. Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U S at 277, 69 L Ed 2d 1, 101 S Ct 2352; Hodel v. Indiana, 452 U S, at 323-324, 69 L Ed 2d 40, 101 S Ct 2376.
>
> The legislative history provides a simple answer: There is ample support for Congress' conclusions.

*FERC v. Mississippi,* 456 U.S. at 755-56.

The rational basis test applied by the Supreme Court in *FERC v. Mississippi* is the same rational basis test used by the Kansas Supreme Court in the *Kansas City Power & Light* case even though the former tested PURPA's constitutionality under the commerce clause while the latter tested PURPA pursuant to the fifth and fourteenth

amendments. The rational basis test was properly applied in both cases. (*FERC v. Mississippi*, 456 U.S. at 755-56; *Kansas City Power & Light Co. v. Kansas Corporation Commission*, 238 Kan. at 854). Further, while Appellant has challenged the results of the test, it has not challenged the application of the rational basis test to the alleged fifth and fourteenth amendment violations. Application of the rational basis test resulted in the holding in both cases that: "there is ample support for Congress' actions." (456 U.S. at 756; 238 Kan. at 854).

In *American Paper Institute v. American Electric Power Service Corp.*, this Court found that FERC did not exceed its authority in promulgating the federal regulations necessary to effect purchases or sales of electricity authorized by PURPA. (*American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402, 413, 103 S.Ct. 1921, 76 L.Ed.2d 22 [1983]); *Kansas City Power & Light Co. v. Kansas Corporation Commission*, 238 Kan. 842, 844, 715 P.2d 19 [1986]).

This appeal should be dismissed or the decision of the Kansas Supreme Court affirmed because the question of the constitutionality of PURPA and the federal regulations implementing PURPA has previously been settled by this Court. *Equitable Life Assurance Society of United States v. Brown*, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902). *Minneapolis, St. Paul, & Sault Ste. M. R. Co. v. Merrick Co.*, 254 U.S. 376, 41 S.Ct. 142, 65 L.Ed. 312 (1920); *Utley v. City of St. Petersburg*, 292 U.S. 106, 54 S.Ct. 593, 78 L.Ed. 1155 (1933); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933); *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

## CONCLUSION

Appellant's Jurisdictional Statement raises a well-settled federal question. The only issue in this appeal is the constitutionality of a federal statute and regulations pertaining to cogeneration. This Court has already upheld the constitutionality of Sections 202 and 210 of PURPA using the same rational basis test as employed by the Kansas Supreme Court in the case from which this appeal was taken. For the foregoing reasons, this appeal should be dismissed and the state court's decision affirmed in all respects.

Respectfully submitted,

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